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Laboratory of Ideas: One State's Successful Attempt to Constitutionally Ensure a Healthier Environment

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Laboratory Of Ideas: One State's Successful Attempt To Constitutionally Ensure A Healthier Environment

Fernando M. Pinguelo *

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I. Introduction

When President William Jefferson Clinton addressed the residents of Northern New Jersey on March 11, 1996, he touched on an all too familiar issue in the State--the environment. In his campaign address, President Clinton proclaimed: It will not be a miracle that preserves America's environment and the global environment; it will be the result of thousands and thousands of people--ultimately millions of people--devoting themselves to a common cause."¹ As the President continued to highlight New Jersey's frightening environmental plight--100 toxic hot spots that await clean-up, 400,000 children live a mere bicycle-ride away from these sites²--the State Legislature began to formulate a plan with the potential to revolutionize the way states address their environmental concerns. This plan proposed to amend Article VIII, Section II of the Constitution of the State of New Jersey. The plan required asking the citizens of New Jersey, in the general election on November 5, 1996, to vote on whether they would support an amendment which would dedicate 4% of the State's Corporate Business Tax revenue to fund hazardous discharge cleanup, underground storage tank improvements, and surface water quality projects. As the voting results of the proposed amendment were tallied, New Jersey citizens once again proved their commitment to the common cause of making their environment cleaner and healthier.³

This paper first reviews how the bleak reality of New Jersey's environmental health forced the state to adopt many aggressive remedial measures in the past. Next, this paper tracks how the recent amendment made its way from an idea to a highly supported state

¹ President William Jefferson Clinton, Remarks at Fairleigh Dickinson University to the Residents of Northern New Jersey, March 11, 1996, *available in* 1996 WL 104790.

² *Id.*

³ Tom Johnson, *2 Green Measures Win Voter Approval*, THE STAR-LEDGER, Nov. 6, 1996, at 2, *available in* 1996 WL 11887983.

initiative and discusses why New Jersey chose a state constitutional amendment as its vehicle to deal with these environmental realities. This paper also analyses other states' environmental constitutional amendments and determines how and why they have been either successful or unsuccessful. The paper then discusses how and why New Jersey's amendment will succeed and why New Jersey's environmental example should once again serve as a model for other states to replicate. Finally, this paper explains why other states should learn from the environmental mistakes of states like New Jersey by focusing on preventative measures rather than being forced into the reactive measures to which New Jersey resorted.

II. The Status Of New Jersey's Environmental Concerns

Without a doubt, New Jersey developed into an environmental nightmare. New Jersey consists of over 7.6 million residents and it rates as the most densely populated and highly industrialized state in the nation.⁴ Projections indicate that New Jersey's population may increase by as much as 1.3 million by the year 2010.⁵ New Jerseyans produce more solid waste per person than on a per person basis in any other city, state or country in the world.⁶ New Jersey boasts more miles of highway per square mile, the highest per capita vehicle registration, and the heaviest travel density of any state.⁷

New Jersey houses numerous old industrial sites.⁸ It is one of

⁴ I. Leo Motiuk, *Environment 1990 -- An Agenda For Action*, in INTRODUCTION TO ENVIRONMENTAL LAW IN NEW JERSEY, 348 (356 PLI/Real Estate and Practice Course Handbook Series No. 237, 1990).

⁵ *Id.* at 347.

⁶ *Id.* at 354.

⁷ *Id.* at 348.

⁸ I. Leo Motiuk & Daniel J. Sheridan, *New Jersey's Environmental Cleanup Responsibility Act: Past Problems, Present Policies, Future Trends*, in INTRODUCTION TO ENVIRONMENTAL LAW IN NEW JERSEY, 317 (356 PLI/Real Estate Law & Practice Course Handbook Series No. 237, 1990).

the largest petrochemical manufacturing states in the nation.⁹ It has the nation's highest concentration of chemical and pharmaceutical plants and thus the highest production of toxic wastes. New Jersey ranks first among the fifty states in toxic dumps to be cleaned-up under the federal Superfund program.¹⁰ Three hundred thirty-three major toxic waste sites in New Jersey have required the state to spend \$650 million on toxic-site clean-ups over the past two decades.¹¹

Without question, New Jersey must carefully manage its population and development growth if the State is to avoid further environmental repercussions. No one knows this better than New Jersey residents themselves. In fact, most New Jersey public opinion polls rank environmental issues as the number one problem facing the state, ahead of concerns over taxes, crime, and the economy.¹²

All sectors of the New Jersey community recognize that the State will prosper only if all of its participants are willing to sacrifice or compromise on some of their cherished objectives and strategies. A quality environment depends both on remediating contamination and on actively protecting and preserving ecology sensitive natural resources. Fortunately, the sincere interest of New Jersey citizens in environmental matters is not lost on elected officials. At all levels of government, political leaders in New Jersey are recognizing and addressing the concerns of their constituents. In fact, state legislators have introduced over 1,800 bills to address environmental concerns since the start of the 1988-89 Session of the New Jersey Legislature.¹³ The need for new programs grows as the concern for a proper

⁹ *Pa. Second in Net Export of Toxic Waste*, READING TIMES & EAGLE, May 8, 1990, available in 1990 WL 6584069.

¹⁰ *No Courage on Toxic Waste*, THE RECORD, Northern New Jersey, December 20, 1989, available in 1989 WL 5551912; see Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9611 (1980).

¹¹ *Senate Panel Approves Constitutional Change for Toxic Cleanups*, The Associated Press Political Service, May 16, 1996, available in 1996 WL 5382644.

¹² Motiuk, *Environment 1990*, *supra* note 3, at 345.

¹³ *Id.* at 345.

balance between a quality environment and economic development continues to unfold.

The strong commitment of New Jersey residents and elected officials continues to provide the State with the necessary foundation to build upon its many environmental accomplishments of the past thirty years. These accomplishments are significant--the air is cleaner; rivers, streams, and wetlands are being preserved; old industrial sites have been, and continue to be, cleaned up; and more and more species and habitats are being protected. New Jersey joins the rest of the nation as it struggles with the many obstacles in the way of environmental progress--budget cuts, competing business interests, slow environmental clean-up, fear of disproportionate costs. Overcoming these competing interests is a difficult challenge.

However, New Jersey steps into the forefront once again to meet that challenge.¹⁴ Combined with funds from the federal government and grants matched by local government, New Jersey made a commitment of over a billion dollars to protecting open space and providing parks and recreational facilities. As a leader in environmental protection, New Jersey constantly looks for ways to supplement traditional means of achieving its environmental goals. The most recent example of such revolutionary initiatives is the present environmental amendment to the State's constitution.

III. New Jersey's Constitutional Amendment

New Jersey's revolutionary constitutional initiative began developing in January, 1996.¹⁵ New Jersey lawmakers and environmentalists were facing serious threats which would negatively

¹⁴ *Id.* at 347 ("New Jerseyans showed tremendous foresight in 1961 when voters overwhelmingly approved the first Green Acres Bond Issue to preserve open space. Since then, voters have approved six bond issues").

¹⁵ Tom Johnson, *Lawmakers on Both Side of Aisle Back Funding for Pollution Clean-ups*, THE STAR-LEDGER, Jan. 25, 1996, available in 1996 WL 7914714.

affect the environmental health of the State.¹⁶ Both state and federal money for environmental clean-up quickly shrank and threatened to disappear completely.¹⁷ The Federal Superfund Toxic Waste Tax had expired in December 1995, and the prospect that existing state clean-up money would be exhausted by July or August of 1996 meant that New Jersey was in need of very serious measures.¹⁸

Senate Majority leader John O. Bennett, a Monmouth County Republican who has pushed for other hazardous waste funding initiatives in the past, lead the way to develop a solution which would help avert these obvious environmental dangers.¹⁹ Sen. Bennett knew that support from all special interests would be needed to ensure the success of a proposed constitutional amendment which would provide adequate funds for environmental clean-up.²⁰ With that in mind, Sen. Bennett lobbied the support of Sen. John Adler, a Camden Democrat, and the New Jersey Environmental Federation, the State's largest environmental organization.²¹

Sen. Bennett's plan to propose a state constitutional amendment that helps to alleviate the dangers that loom in the near future was significantly influenced by his experience of six years prior when he helped to push through a comprehensive hazardous funding package that relied on \$45-50 million a year in corporate business taxes.²² Sen. Bennett's experience taught him that a statute was not enough to prevent former Governors Kean and Florio in the late 1980s and early 1990s from siphoning off the money when budgets got tight.²³ Sen. Bennett knew from this experience that this new measure needed to be very specific and as unchangeable as

¹⁶ Johnson, *Lawmakers*, *supra* note 15.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

politically possible.²⁴ In an effort to prevent lawmakers and future administrators from diverting targeted funds for clean-ups to help balance the overall state budget, Bennett knew that something needed to be different. "With a constitutional amendment, no games can be played . . ."²⁵

Republicans and Democrats alike supported the amendment. Assemblyman Steven Corodemus, Republican from Monmouth, who also sponsored the amendment said, "[t]he plain fact of the matter is we've got an awesome job in the State of New Jersey for clean-ups. The work is not being done. We need the money."²⁶ Ironically, in a world where environmentalists and business lobbyists are often, if not always, on opposite ends of a political debate, Sen. Bennett's proposed amendment met with little opposition. Republican Governor Christine Todd Whitman reserved her judgment of the proposed constitutional amendment until she was able to read exactly what the amendment would entail. State Treasurer Brian Clymer initially had some reservations about the proposed amendment and argued "[w]e don't really need to tie up funds at the rate of \$60 million a year."²⁷ Clymer argued that constitutionally dedicating taxes to specific purposes robs future governors and law makers of the flexibility they need to craft budgets that address what they see as more pressing concerns.²⁸

The strongest opposition against the amendment came from the League of Women Voters of New Jersey (League).²⁹ However, this opposition focused on the utilization of a constitutional amendment to solve the environmental problems of the state, rather than on any actual environmental goals that the amendment

²⁴ Johnson, *Lawmakers*, *supra* note 15.

²⁵ *Id.*

²⁶ Robert Schwaneberg, *Plan would allot taxes for environmental use*, THE STAR-LEDGER, Mar. 12, 1996, available in 1996 WL 7923811.

²⁷ *Id.*

²⁸ Johnson, 2 *Green Measures*, *supra* note 3.

²⁹ *Id.*

embodied.³⁰ The League noted that more than forty percent of New Jersey's state tax revenues already are constitutionally dedicated. The League argued: "What we're opposed to is amending the constitution every time we have a priority that needs funding."³¹

Aside from these concerns, support for the amendment was virtually unanimous in the political arena.³² Proponents of the amendment represented varying interests.³³ Business lobbyists joined the environmental lobbyists in support of the amendment.³⁴ Business lobbyists argued that the State's past history of raiding funds earmarked for the environment for other purposes could no longer be tolerated.³⁵ They believed that nothing less than a constitutional amendment would prevent this misuse of environmental clean-up funds.³⁶ Business lobbyists also knew that the amendment would help owners of underground storage tanks, primarily service stations and oil dealers, comply with federal requirements to upgrade and fix faulty tanks.³⁷

Although at first reluctant to endorse the proposed amendment, Hal Bozarth, a lobbyist for the Chemical Industry Council, argued: "I'd feel a lot better about this constitutional amendment if it guaranteed that every dollar would actually go to sticking a shovel in the ground. No lawyers, no consultants, no planning."³⁸ Bozarth's half-hearted support of the amendment shows that even the "polluters" see the merits of such an amendment. Members of his council already contributed to the \$1.6 billion

³⁰ Johnson, 2 *Green Measures*, *supra* note 3.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Schwaneberg, *supra* note 26.

³⁷ *Id.*

³⁸ *Id.*

Superfund program and pay roughly \$20 million a year in additional taxes under the New Jersey Spill Compensation Fund.³⁹

Such overwhelming support transcended the traditional lines of self-interest and represented the ability of all sides of the issue to recognize the grave state of the environment in New Jersey and realize that efficient clean-up is the only solution. Most of these special interest groups recognize that with a number of major environmental achievements in the State already realized, the biggest hurdle facing the State is the funding needed to continue these efforts.⁴⁰ Supporters argued that nothing less than a constitutional amendment would guarantee the consistent, adequate, long term funding required to make steady progress in New Jersey's pollution problems.

In the November 5, 1996 election, New Jersey citizens overwhelmingly supported the bill with 77.0 percent voter approval.⁴¹ In a fiscally conservative state, the support was likely due in part to the fact that the amendment does not increase the taxes paid by New Jersey residents. Rather, the funds come from businesses who pay for the privilege of doing business in New Jersey. The amendment dedicates four percent of the already existing business tax to cleaning up polluted industrial sites and waterways and removing leaking underground storage tanks.⁴² This means that a solid commitment of about \$48 million a year will be used for environmental purposes.⁴³

"This is the strongest piece of pro-environmental legislation that New Jersey has seen in a long time," said Dolores Phillips,

³⁹ *Id.*

⁴⁰ Tom Johnson, *Funds for Dredging and Toxic Clean-ups Go on Fall Ballot, Environmentalists Praise the Action*, THE STAR-LEDGER, June 28, 1996, available in 1996 WL 7945556.

⁴¹ Johnson, 2 *Green Measures*, *supra* note 3.

⁴² Joe Donohue, *Panel Backs Proposal to Set Aside Cleanup Funds: Amendment to the State Constitution Would Dedicate Corporate Taxes*, THE STAR-LEDGER, May, 17, 1996, available in 1996 WL 7935031.

⁴³ *Id.*

lobbyist for the New Jersey Environmental Federation.⁴⁴ It won support only after the environmental committee agreed to reduce from 6 percent to 4 percent the portion of State corporation business taxes dedicated for clean-up.⁴⁵ General concerns about the State revenue outlook prompted the reduction.⁴⁶

New Jersey's constitutional amendment truly revolutionizes state constitutional law because it is the most comprehensive environmental funding mechanism in existence today. The environmental amendment provides in relevant part:

6. There shall be credited annually to a special account in the General Fund an amount equivalent to 4% of the revenue annually derived from the tax imposed pursuant to the "Corporation Business Tax Act (1945)," . . .

The amount annually credited . . . shall be dedicated and shall be appropriated from time to time by the Legislature only for the following purposes: paying of financing costs incurred by the State for the remediation of discharges of hazardous substances, which costs may include performing necessary operation and maintenance activities relating to remedial actions and costs incurred for providing alternative sources of public or private water supplies, when a water supply has been, or is suspected of being, contaminated by a hazardous substance discharge; providing funding, including the provision of loans or grants, for the upgrade, replacement, or

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

closure of underground storage tanks that store or were used to store hazardous substances, and for the costs of remediating any discharge therefrom; and for paying or financing the cost of water quality point and non-point source pollution monitoring, watershed based water resource planning and management, and non-point source pollution prevention projects.

It shall not be competent for the Legislature . . . to borrow, appropriate, or use the amount credited to the special account pursuant to this paragraph, or any portion thereof for any purpose or in any manner other than as enumerated in this paragraph. . .

(c) A minimum of one-half of the amount annually credited pursuant to this paragraph shall be dedicated, and shall be appropriated from time to time by the Legislature, only for paying or financing costs incurred by the State for the remediation of discharges of hazardous substances, which costs may include performing necessary operation and maintenance activities relating to remedial actions and costs incurred for providing alternative sources of public or private water supplies, when a water supply has been , or is suspected of being, contaminated by a hazardous substance discharge. No moneys appropriated pursuant to this subparagraph (c) may be expended for any indirect administrative costs of the State, its departments, agencies, or authorities. . . .

(See Appendix I for full text).

Although unique in its approach to the problems of pollution, New Jersey is by no means alone in its attempts to effectively cope with the problems caused by decades of environmental abuses. Many other states have attempted to deal with environmental and developmental issues by constitutional means. Before attempting to predict the success or failure of New Jersey's constitutional amendment, it is helpful to review the successes and failures of other similar state constitutional provisions.

IV. Other State Constitutions With Environmental Provisions Or Amendments

Environmental constitutional amendments are not a new phenomenon. In fact, in the late 1960s and early 1970s proposals were made in the United States Congress for a constitutional amendment establishing every citizen's right to a healthful environment.⁴⁷ However, these efforts failed in part perhaps because of the success in enacting environmental protection statutes.⁴⁸ A series of environmental protection statutes fostered the belief that a constitutional amendment was unnecessary.⁴⁹ These statutes demonstrated that Congress already responded to public outcries for accountability of polluters.

Indeed, federal environmental statutes have made significant advances toward solving many health problems. The Clean Water Act⁵⁰ ensures that rivers do not catch fire. Emission controls on

⁴⁷ Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 14-15 (1992); H.R.J. Res. 1321, 90th Cong. (1968); S.J. Res. 169, 91st Cong. (1970).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251 - 1387 (1994).

automobiles have reduced air pollution, and the use of toxic pesticides such as DDT has been curtailed. The Endangered Species Act⁵¹ has enabled endangered species to survive in a world where human acts nearly wiped-out their existence. These laws and many others have had a tremendous effect on environmental improvement. However, the problems posed in the 1980s and 1990s require new approaches toward environmental health. Issues such as economic growth, individual property rights and budget constraints are forcing states to adopt new measures to ensure that the environment remains an important political issue.

In the area of environmental law, it appears that states are becoming the laboratory of ideas more so than the federal government. State constitutional amendments which specifically provide for some type of environmental protection are a new measure which has received mixed results.⁵² The past thirty years, or so, saw the enactment of constitutional provisions that deal with either the environment or specific natural resources in more than thirty U.S. states.⁵³ The successes and failures of these state constitutions'

⁵¹ Endangered Species Act, 16 U.S.C. §§ 1531 - 1544 (1994).

⁵² Rodger Schlickeisen, *Protecting Biodiversity For Future Generations: An Argument For A Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181, 207-16 (1994).

⁵³ See, e.g., ALA. CONST. art. I, § 24, & amend. 272; ALASKA CONST. art. VIII, §§ 1-18; ARIZ. CONST. art. X, §§ 1,2,9; ARK. CONST. amend. 35; CAL. CONST. art. I, § 25, art. X, §§ 2-4; COLO. CONST. art. XVI, §§ 5-8, art. XVIII, §§ 2, 6; FLA. CONST. art. II, § 7, art. IV, § 9, art. X, § 11; GA. CONST. art. III, § 6; HAW. CONST. art. XI, §§ 1, 2, 3, 6, 7, 8, 9, 11; IDAHO CONST. art. XV, §§ 1-7; ILL. CONST. art. XI, §§ 1-2; LA. CONST. art. IX, §§ 1-9; MICH. CONST. art. IV, § 52, art. IX, § 35, art. X, § 5; MO. CONST. art. III, §§ 37(b)-(c), (e), 47, 48, art. IV, §§ 35, 36, 40(a), 43 (a), 47 (a); MONT. CONST. art. II, § 3, art. IX, §§ 1-4; NEB. CONST. art. XV, §§ 4-6; N.M. CONST. art. XV, §§ 1, 2, art. XVI, §§ 1-3, art. XX, § 21; N.Y. CONST. art. XIV, §§ 1-5; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; OKLA. CONST. art. XXVI, § 1-4; OR. CONST. arts. XI-D, -E, -H, -I(a); PA. CONST. art. I, § 27, art. VIII, §§ 15, 16; R.I. CONST. art. I, § 17; S.C. CONST. art. XIV, §§ 1-4; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVII, § 1, art. XVIII, § 1; VA. CONST. art. XI, §§ 1-3; WIS. CONST. art. VIII, § 10, Art. IX, § 1; WYO. CONST. art. I, § 31, art. VIII, §§ 1-5.

environmental amendments suggest how best to draft future provisions.⁵⁴ When drafting constitutional environmental provisions, legislatures need to resolve several issues.⁵⁵ For example, they must determine what kind of right or duty exists, who can claim the right and who is obligated to protect the right or carry out the duty.⁵⁶ Generally speaking, the best provisions are those that are both self-executing and enforceable.⁵⁷

Since most states have added some sort of environmental provision to their constitution, it is helpful to categorize the types of provisions which are in use today. Two general categories of environmental provisions have emerged.⁵⁸ The first category consists of broadly worded provisions that either declare state policy to include environmental protection⁵⁹ or recognize a right to environmental quality.⁶⁰ Brevity and vagueness are characteristic of this first category. The second category of environmental provisions is integrated, narrowly tailored and fairly comprehensive.⁶¹ This type includes details on specific resources or public interests, as well as a declaration of general policy.⁶² Both general categories of provisions lend themselves to different objectives, and their respective effectiveness also differs tremendously.

Bruce Ledewitz, in his article *The Challenge Of, And Judicial Response To, Environmental Provisions In State Constitutions*, explores the successes and failures of such state constitutional

⁵⁴ Schlickeisen, *supra* note 52, at 207-10.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See, e.g., N.Y. CONST. art. XIV, § 4; N.C. CONST. art. XIV, § 5; VA. CONST. art. XI, § 1

⁶⁰ See, e.g., ILL. CONST. art. XI, § 2; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17.

⁶¹ Schlickeisen, *supra* note 52, at 207-10.

⁶² See, e.g., ALASKA CONST. art. VIII, §§ 1-18; HAW. CONST. art. XI, §§ 1, 2, 3, 6, 7, 9, 11.

remedies.⁶³ His research indicates that although one may think that environmental protection is a recent phenomenon, "recognition and protection of natural resources in state constitutions predate the modern environmental movement."⁶⁴ A common example of the pre-modern environmental movement legislation is the historic guarantee of public rights to water.⁶⁵ A Colorado state constitutional provision gives a general idea of how these types of provisions are worded: "The right to divert the unappropriated waters of any natural stream to benefit uses shall never be denied . . ."⁶⁶ Other water rights are protected differently. Rhode Island, for example, guarantees "rights of fishery, and the privileges of the shore."⁶⁷ Some states guarantee public access to other particular natural resources. In New York, this consists of a ban on the lease, sale, exchange or logging of forest preserves.⁶⁸ In Virginia, a public trust exists for natural oyster beds.⁶⁹ In Hawaii, there is a public trust in granted lands.⁷⁰

It is important to note that whatever the level of environmental protection each state constitutional provisions provides, there is usually a correlation between how developed or underdeveloped a state is and the effectiveness of their respective environmental protection provisions. Quite clearly, for example, the provisions in Alaska, Louisiana and New Mexico anticipate substantial development of "natural resources," "minerals" and "energy sources" to approach "self-sufficiency."⁷¹ Therefore, their

⁶³ Bruce Ledewitz, *The Challenge Of, And Judicial Response To, Environmental Provisions In State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 33 (1991).

⁶⁴ *Id.* at 35.

⁶⁵ See, e.g., CAL. CONST. arts. X and XA; COLO. CONST. art. XVI, §§ 5 - 6; NEB. CONST. art. XV, §§ 4 - 7; MONT. CONST. art. IX, § 3. List is representative only.

⁶⁶ COLO. CONST. art. XVI, § 5.

⁶⁷ R.I. CONST. art. I, § 17.

⁶⁸ N.Y. CONST. art. XIV, § 1.

⁶⁹ VA. CONST. art. XI, § 3.

⁷⁰ HAW. CONST. art. XII, § 4.

⁷¹ Ledewitz, *supra* note 63, at 35-38.

guaranteed rights tend to be broader to ensure adaptation to future unforeseen changes and needs.⁷² Alaska's "common usage" provision is illustrative: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."⁷³ "While it is not always possible to say how such provisions would be enforced, or to what extent, it is fair to say that the framers and ratifiers of these provisions were taking a generous view of interests related to the environment that merit legal protection."⁷⁴

Application of these broad provisions to actual claims appears to be grudging. The reason is that is that courts construing environmental provisions in state constitutions are faced with a series of questions regarding statutory construction.⁷⁵ Broader environmental provisions in state constitutions generally pose a challenging conundrum on state courts who interpret these provisions. On the one hand, there is the fundamental concept that the environment is one interrelated whole with humankind being just one part of the web of nature.⁷⁶ On the other hand, there is the competing concept that has been the fabric of our society since the United States was formed over 200 years ago--private property and the individualist assumptions of industrialism.⁷⁷ These two competing concepts are more often than not inconsistent with each other and it is left up to the state courts to balance the interests and decide which must prevail.⁷⁸ It is in this interpretive process that some of the intentions of state constitutional environmental provisions get lost.⁷⁹ The resulting answers have been important in defining the reach of state constitutional protections of the

⁷² Ledewitz, *supra* note 63, at 36.

⁷³ ALASKA CONST. art. VII, § 3.

⁷⁴ Ledewitz, *supra* note 63, at 40.

⁷⁵ *Id.* at 46.

⁷⁶ Ledewitz, *supra* note 63, at 54.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 40.

environment. The answers to these questions are the reasons for the overall limited effect of these broad provisions.⁸⁰

Broad state constitutional environmental provisions also pose other interpretive obstacles. How are courts to interpret such words as "beautiful" and "healthful"? New Mexico's constitutional provisions is an example of such an interpretive nightmare.⁸¹ New Mexico declares that "the state's beautiful and healthful environment" is "of fundamental importance." This concern is then qualified so that "control of pollution" is "consistent with the use and development of these resources for the maximum benefit of the people."⁸² The latter phrase suggests the importance of either commercial development or recreational development, or both.⁸³ "[I]t anticipates uses that may not serve to maintain the beauty and health of the environment."⁸⁴ Thus, a court faced with a case requiring it to interpret the constitutional provision must decide the outcome of a dilemma which involves the competing interests of valuable use verses a healthful environment.⁸⁵ Although such interpretations are a common function of courts, the point is that if a healthful environment is truly striven for, there exist more efficient methods of ensuring that the goal is met. The most obvious being a provision which specifies how the goals will be achieved. It will need to be a provision which requires little or no judicial interpretation.

In light of the difficulties involved, no simple solution exists in interpreting these broad provisions. Some courts have decided to defer to the legislature and administrative agencies to decide.⁸⁶ Other courts weigh heavily procedural regularity and settled property

⁸⁰ Ledewitz, *supra* note 63, at 40.

⁸¹ N.M. CONST. art. XV, §§ 1, 2; art. XVI, §§ 1-3; art. XX, § 21.

⁸² *Id.* at art. XX § 21.

⁸³ Ledewitz, *supra* note 63, at 60.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 61.

rights.⁸⁷ Still others emphasize the court's own independent judgment.⁸⁸ Although these tendencies by courts are not pronounced and are often combined, they do illustrate available options for defining these constitutional environmental provisions in the future.⁸⁹

In an effort to avert the aforementioned difficulties associated with broad provisions, a number of states promote the preservation of natural resources through more specific environmental constitutional provisions. These specific provisions usually provide special financial requirements.⁹⁰ Ohio, for example, allows the legislature to exempt from taxation land devoted explicitly to forestry.⁹¹ Oklahoma provides that income generated by the Wildlife Conservation Commission be used for wildlife conservation "and for no other purpose."⁹² These more specific provisions tend to be more successful in achieving environmental goals because they are targeted and therefore do not require judicial interpretation. Their self-executing nature ensures that what is provided for is actually carried out. New Jersey's recent provision provides an excellent example of how specific these provisions need to be in order to achieve their intended purpose of effective environmental improvements. It is currently the most comprehensive provision in existence today and it promises to be one of the most effective.

As President Clinton alluded to the need for common ground as he addressed the residents of Northern New Jersey, the political wheels were already turning to ensure that common ground was established in the area of environmental clean-up. In many ways, New Jersey realistically had no other alternative but to exercise legal strength. The elevation of environmental quality to constitutional stature in New Jersey promises to have positive and extensive consequences.

⁸⁷ Ledewitz, *supra* note 63, at 61.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 36.

⁹¹ OHIO CONST. art. II, § 36.

⁹² OKLA. CONST. art. XXVI, §§ 1-4.

New Jersey's amended state constitution offers a great opportunity in the area of environmental law. By allocating four percent of the state's corporate tax to environmental clean-up, citizens and lawmakers are ensuring that the past environmental progress will continue to develop. Providing a constant source of environmental clean-up funding will ensure to the state's citizens that there can be no political games played with these resources.

One of the main reasons for this success is the fact that New Jersey's environmental constitutional amendment is specific and self-executing. Like the environmental provisions found in Ohio's and Oklahoma's state constitutions, New Jersey's amendment allocates funding for environmental clean-up by earmarking a percentage of an already existing tax to cover costs associated with environment.⁹³ This specificity will avoid the problems faced by broader provisions which have encountered the reluctance of many courts to interpret the environmental provisions forcefully.

New Jersey lawmakers recognized the solution to the problem of vague environmental provisions by wording the provision clearly and with specific language. The result of this approach is that a degree of uniformity will develop and the reliance on judicial interpretation will be minimal. Since the vagueness of provisions often supports the decision to treat the provisions as non-binding by the courts, New Jersey's provision is not likely to be affected by such factors.

V. Conclusion

Generally speaking, environmental provisions in state constitutions have played only a minor role in actually affecting the outcome of cases.⁹⁴ The significance of this statistic indicates that there must be a change in the way such provisions are worded and

⁹³ OKLA. CONST. art. XXVI, §§1-4; OHIO CONST. art. II, § 36.

⁹⁴ Ledewitz, *supra* note 63, at 75.

defined. In order to avoid the clash of obvious competing interests, such environmental provisions should be more specific and defined. However, more important than discovering that specific provisions work more effectively, states must determine how to achieve such specificity, and in turn, such effectiveness. New Jersey's recent state constitutional amendment stands out as an example of how an amendment can and should be worded to result in effective efforts to improve the environment. New Jersey's amendment demonstrates that non-partisan political support and the support of competing special interests are key ingredients to achieving effective environmental legislation. Specific legislation was achieved in New Jersey because the State was reacting to a direct health threat. In many ways, the provision was not about providing relief for future generations, but rather it was about protecting the current population. In other words, New Jersey had no other meaningful choice but to act in a specific and effective manner.

However, there remains an open question: How are the competing interests of industry and the environment supposed to see eye to eye on such a divisive issue? In New Jersey's case, there was almost no other alternative but to enact such a provision. Given the environmental plight that faced New Jersey, the State could not afford to dabble in vague and unproductive language. Dwindling clean-up cash reserves forced lawmakers and business interests to adopt a specific provision which would directly put money into clean-up efforts. Past experiences with discretionary reserves which resulted in diversion of environmental clean-up funds also provided a necessary view of what would happen if the provision was not as specific and mandatory as it is.

Mustering the level of support that the New Jersey amendment enjoyed will be a very challenging task in other states. Economic growth and individual property rights are fundamental values which are not easily compromised, especially when they are juxtaposed with long term environmental consequences. This fact, however, should not discourage states from taking notice of New Jersey's current environmental situation and its past experiences.

New Jersey's rapid industrial growth in the 1950s, 60s and 70s resulted in very serious environmental consequences. States which are now undergoing the kind of development New Jersey underwent forty years ago should capitalize on its mistakes and cautiously develop themselves in a manner which does not result in complete environmental chaos. This development requires the careful balancing of economic benefits with their respective environmental consequences.

Unfortunately, due to the tendency of people to expect instant results and benefits, it will be a difficult task to encourage developing states to heed the warning that New Jersey represents. However, there is hope that such states may recognize the importance and promise of New Jersey's provision. The hope lies in the amendment's expected results. If effective environmental clean-up becomes a reality, New Jersey will lead by example. Not only will New Jersey's state constitutional amendment serve as a model for similar environmental laws in other states, the state's experience with rapid growth will also provide a window to those developing states which are facing the prospect of further resource development. This amendment promises to have an immediate and powerful impact on the many toxic sites that need attention. And in the end, it will be the current and future residents of the State who will benefit most from a cleaner environment.

APPENDIX I

Full Text of New Jersey State Constitutional Amendment

Amend Article VIII, Section II, by the addition of a new paragraph 6 to read as follows:

6. There shall be credited annually to a special account in the General Fund an amount equivalent to 4% of the revenue annually derived from the tax imposed pursuant to the "Corporation Business Tax Act (1945)," P.L. 1945, c. 162 (C. 54:10A-1 et seq.), as amended and supplemented, or any other State law of similar effect.

The amount annually credited pursuant to this paragraph shall be dedicated and shall be appropriated from time to time by the Legislature only for the following purposes: paying of financing costs incurred by the State for the remediation of discharges of hazardous substances, which costs may include performing necessary operation and maintenance activities relating to remedial actions and costs incurred for providing alternative sources of public or private water supplies, when a water supply has been, or is suspected of being, contaminated by a hazardous substance discharge; providing funding, including the provision of loans or grants, for the upgrade, replacement, or closure of underground storage tanks that store or were used to store hazardous substances, and for the costs of remediating any discharge therefrom; and for paying or financing the cost of water quality point and non-point source pollution monitoring, watershed based water resource planning and management, and non-point source pollution prevention projects.

It shall not be competent for the Legislature, under any pretense whatsoever, to borrow, appropriate, or use the amount credited to the special account pursuant to this paragraph, or any portion thereof for any purpose or in any manner other than as enumerated in this paragraph. It shall not be competent for the

Legislature, under any pretense whatever, to borrow, appropriate, or use the amount credited to the special account pursuant to this paragraph, or any portion thereof, for the payment of the principal or interest on any general obligation bond that was approved by the voters prior to this paragraph becoming part of this Constitution.

(a) A minimum of one-sixth of the amount annually credited pursuant to this paragraph, or a minimum of an amount equal to \$5,000,000.00 per year, whichever is less, shall be dedicated, and shall be appropriated from time to time by the Legislature, only for paying or financing the cost of water quality point and non-point source pollution monitoring, watershed based water resource planning and management, and non-point source pollution prevention projects.

(b) A minimum of one-third of the amount annually credited pursuant to this paragraph shall be dedicated, and shall be appropriated from time to time by the Legislature, only for providing funding, including the provision of loans or grants, for the upgrade, replacement, or closure of underground storage tanks that store or were used to store hazardous substances, and for the costs of remediating any discharge therefrom, except that the dedication of moneys pursuant to this subparagraph (b) shall expire on December 31, 2008 and may thereafter be dedicated and appropriated from time to time by the Legislature for any of the purposes authorized pursuant to subparagraphs (a), (b), or (c) of this paragraph. All moneys derived from repayments of any loan issued from the amount dedicated pursuant to this subparagraph (b) shall be dedicated, and shall be appropriated from time to time by the Legislature, only for the purposes authorized pursuant to this subparagraph (b). The dedication of moneys derived from loan repayments shall not expire. No moneys appropriated pursuant to this subparagraph (b) may be expended on any direct or indirect administrative costs of the State or any of its departments, agencies, or authorities. No moneys appropriated pursuant to this subparagraph (b) may be expended on

any upgrade, replacement, or closure of any underground storage tank, or for the remediation of any discharge therefrom, for any underground storage tank owned by the State or any of its departments, agencies, or authorities.

(c) A minimum of one-half of the amount annually credited pursuant to this paragraph shall be dedicated, and shall be appropriated from time to time by the Legislature, only for paying or financing costs incurred by the State for the remediation of discharges of hazardous substances, which costs may include performing necessary operation and maintenance activities relating to remedial actions and costs incurred for providing alternative sources of public or private water supplies, when a water supply has been , or is suspected of being, contaminated by a hazardous substance discharge. No moneys appropriated pursuant to this subparagraph (c) may be expended for any indirect administrative costs of the State, its departments, agencies, or authorities. No more than nine percent of the moneys annually credited pursuant to this paragraph, which shall be taken from the amount dedicated pursuant to this subparagraph (c), may be expended for any direct program administrative costs of the State, its departments, agencies, or authorities. If the Legislature dedicates for the purposes of this subparagraph (c) any moneys above the minimum that is required to be dedicated pursuant to this subparagraph (c), those moneys may not be expended for any direct or indirect administrative costs of the State, its departments, agencies, or authorities.